

## IN THE MATTER OF ARBITRATION BETWEEN

<b>LAW ENFORCEMENT LABOR</b>	)	<b>ARBITRATION</b>
<b>SERVICES, INC.</b>	)	<b>AWARD</b>
	)	
<b>and</b>	)	
	)	<b>LINDHOLM</b>
	)	<b>DISCHARGE</b>
	)	<b>GRIEVANCE</b>
	)	
	)	
<b>COUNTY OF WASHINGTON</b>	)	
	)	<b>BMS CASE NO. 05-PA-599</b>
	)	

Arbitrator: Stephen F. Befort

Hearing Date: January 10, 2006  
January 11, 2006  
January 12, 2006  
January 13, 2006

Date post-hearing briefs received: March 28, 2006

Date of decision: April 25, 2006

### APPEARANCES

For the Union: Marylee Abrams

For the Employer: Frank J. Madden  
Pamela R. Galanter

### INTRODUCTION

Law Enforcement Labor Services, Inc. (Union) is the exclusive representative of a unit of deputy sheriffs and sergeants employed by the County of Washington (Employer) in its Sheriff's Office. The Union, in this grievance, claims that the City violated the parties' collective bargaining agreement by discharging Michael Lindholm from his

position as a Washington County Deputy Sheriff without just cause. The Employer responds that it had just cause to discharge the grievant because of his inappropriate use of firearms. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

### **ISSUE**

Did the Employer have just cause to terminate Deputy Sheriff Michael Lindholm on November 18, 2004? If not, what is the appropriate remedy?

### **RELEVANT CONTRACT LANGUAGE**

#### **ARTICLE X. DISCIPLINE**

- 10.1 The EMPLOYER will discipline employees who have completed the required probationary period for just cause only. Discipline, depending upon the severity of the infraction, will be in the form of the following:

Oral reprimand;  
Written reprimand;  
Suspension;  
Demotion; or  
Discharge.

### **FACTUAL BACKGROUND**

Michael Lindholm has worked for Washington County as a Deputy Sheriff since 1996. He started as a patrol officer and then transferred to the Investigations Unit in 2000. He returned to the Patrol Unit in 2003. The Employer generally gave Lindholm positive performance evaluations and never imposed any formal discipline.

The incident that set this grievance in motion took place during a morning roll call on May 26, 2004. While Sergeant Larry Osterman was addressing the group he heard a clicking sound and observed Lindholm holding a small, non-duty pistol upside down and

dragging it across the table. Osterman asked Lindholm to put the gun away, and Lindholm did so. When Osterman subsequently sought out Lindholm, Osterman testified that Lindholm told him that he often has his gun out during roll call, and that usual roll call sergeants, David Heuer and Brent Olson, do not disapprove of that conduct. Osterman spoke with the two sergeants, each of whom indicated that they did not permit gun play during roll call sessions.

Sergeant Osterman then checked with Deputy Jerry Lannon, a Firearms Instructor, to see if Lindholm had qualified with the small pistol he had used during roll call. Although Lindholm was qualified and permitted to carry the pistol as a second firearm on duty, Lannon recounted two instances in which he had observed Lindholm engage in what Lannon thought were inappropriate firearm handling incidents.

Sergeant Osterman reported this information to Commander Tim Tuthill. Commander Tuthill, on May 28, 2004, directed Sergeant Osterman to undertake a division level investigation of Lindholm's firearm practices.

Sergeant Osterman began the investigation by interviewing numerous employees of the County Sheriff's Office. Following the first wave of interviews, Sheriff James Frank concluded that sufficient information had been revealed to warrant a criminal investigation, and he asked the Anoka County Attorney's Office in July 2004 to undertake that task. Sergeant Osterman's investigation was put on hold pending the criminal investigation. Osterman reopened the civil investigation following the dismissal of the criminal investigation in September 2004.

After conducting approximately 50 interviews of County employees and others with possible knowledge, Sergeant Osterman concluded his investigation by preparing

two summary documents. He first prepared a document entitled “Investigation Steps” in which he explained the course of his investigation and, after listening to the pertinent tape recordings, summarized the substance of each interview. Osterman then prepared a second document, entitled “Investigative Summary Report.” This document more specifically summarized the information relating to the charges against Deputy Lindholm and ended with Osterman’s investigative conclusions. Osterman testified that he prepared this second document by relying on information set out in the first document without again listening to the interview tapes.

The Investigative Summary Report, dated November 4, 2004, sustained the following allegations with respect to Deputy Lindholm’s handling of firearms. Each of the allegations was corroborated by testimony at the arbitration hearing. Lindholm’s response to each allegation is noted in parenthesis following the corresponding allegation:

1. Lindholm pointed his duty firearm at Deputy Andy Ellickson and tracked him with the firearm as Ellickson was driving out of the squad garage.

[Lindholm did not recall this incident, but did not deny that it may have occurred.]

2. Lindholm pointed both his duty firearm and a small handgun at Deputy Miguel Tellez.

[Lindholm did not recall this incident, but did not deny that it may have occurred.]

3. Lindholm pointed his duty firearm point blank and with direct physical contact to the back of Deputy Greg Reiter’s head on at least six different occasions.

[Lindholm admitted placing his duty firearm on the back of Deputy Reiter’s head in jest on more than one occasion. Lindholm and Reiter both testified that Reiter also pointed a firearm at Lindholm on at least two occasions.]

4. Lindholm placed a cap gun to the back of Deputy Reiter's head and pulled the trigger on at least two occasions.

[Lindholm admits this allegation.]

5. Lindholm pulled his duty firearm from his holster and pressed it against Deputy Reiter's chest.

[Lindholm did not recall this incident.]

6. Lindholm, while in a monitoring room observing the interview of a civilian, pointed a firearm at the civilian while another deputy, Danelle Erickson, was in or near the line of fire.

[Lindholm did not recall this incident.]

7. Lindholm repeatedly engaged in quick draws and in spinning his firearm in an "old west" manner while on duty.

[Lindholm admits this allegation.]

8. Lindholm spun his duty firearm in an "old west" manner in the presence of a confidential informant.

[Lindholm did not recall this incident.]

Although Lindholm does not affirmatively deny the Employer's allegations, the Union introduced evidence concerning two potentially ameliorating matters. First, the Union elicited testimony tending to show that a culture of gun play existed in the Washington County Sheriff's Office which was condoned by department supervisors. Lindholm testified that pranks and jokes, including gun horseplay, were a frequent activity among Sheriff's Office employees. Deputy Michael Benson corroborated this view, testifying that for a number of years the Sheriff's Office exhibited a "wild, wild west mentality toward gun use." Former Sergeant Jay Kimble, who retired in 2001, and Stillwater Police Officer Jeff Stender, who was assigned to work out of the Sheriff's

Office for sixteen months beginning in 2000, also testified that gun horseplay was a routine occurrence within the department.

In contrast, five employer witnesses (Sergeant Larry Osterman, Sergeant Wayne Johnson, Deputy Miguel Tellez, Deputy Danelle Erickson, and Deputy Keith Anderson) testified that gun horseplay was not a widely occurring practice and that no culture accepting such activity existed in the Sheriff's Office. Erickson, for example, testified that while Lindholm and Reiter frequently played with guns, no office-wide culture of inappropriate gun play otherwise existed. A number of other employees made similar statements during Sergeant Osterman's investigatory interviews.

Second, the Union introduced evidence showing that the Employer never disciplined either Lindholm or Reiter for their gun play activities. Witnesses testified that a number of sergeants and deputies told Lindholm and Reiter to "knock off" their antics. Lindholm, Reiter, and Erickson each testified that the horseplay was sufficiently widespread that the Office's supervisors must have known about the prevalence of the gun horseplay. But, the record is devoid of any evidence establishing that any supervisor ever formally warned Lindholm about such behavior or informed him that discipline would result if such activity continued.

Sergeant Osterman delivered the Investigative Summary Report to Sheriff Frank early in November 2004. After reviewing the report and consulting with his supervisory staff, Sheriff Frank decided to discharge Deputy Lindholm. On November 8, 2004, Frank sent Lindholm a Notice of Intent to Terminate letter which stated in pertinent part as follows:

This is formal notice of intent to terminate your employment with Washington County for misconduct. The specific grounds for the termination of your employment include the violations of the following:

\* \* \*

3) WASHINGTON COUNTY SHERIFF'S POLICY A130.03 – FIREARMS POLICY

III. Procedures

- E. The handgun shall never be displayed or removed from its holster other than in the performance of duty, in the course of routine maintenance, or during training.

4) COUNTY PERSONNEL RULES AND REGULATIONS

- 12.A.11 The willful violation of any departmental or county rule or regulation which has been adopted in written form and is known, or reasonably should be known, by the employee involved – County Policy #5008 – Respectful Workplace.
- 12.A.15 Willful misuse and/or negligence of county property or equipment.
- 12.A.23 Failure to obey safety rules or regulations or engaging in unsafe work practices.
- 25.C.2 In compliance with the above responsibilities, all employees shall:
  - 2. Refrain from any unsafe act that might endanger themselves or their coworkers.

A complaint was received and investigated regarding your behavior. As a result, the Sheriff's Office conducted an investigation to determine the legitimacy of the complaint. The findings of the investigation substantiated that on numerous occasions you violated departmental and county policies.

After Lindholm declined to attend a Lauderhill hearing scheduled for November 10, Sheriff Frank terminated his employment effective November 18, 2004. The Union filed a grievance challenging the Employer's discharge decision on the following day, and that grievance has proceeded to arbitration.

The Employer, under the auspices of Sergeant Osterman, also conducted a parallel investigation concerning Deputy Reiter's gun horseplay activities. This investigation concluded that Reiter engaged in inappropriate gun horseplay activities, including two instances in which he pointed a firearm at Lindholm. The Employer responded to this investigation by imposing a 20 day unpaid suspension on Reiter.

### **POSITIONS OF THE PARTIES**

#### **Employer:**

The Employer contends that it has just cause to discharge the grievant. The Employer asserts that the overwhelming evidence adduced at the hearing shows that Deputy Lindholm repeatedly misused guns in a reckless and dangerous manner. Indeed, Lindholm does not affirmatively deny the veracity of these allegations. The Employer further argues that the penalty of discharge is appropriate under the circumstances. The Employer claims that it conducted a fair investigation and that Lindholm's transgressions were so serious as to warrant a greater sanction than that imposed with respect to Deputy Reiter. Finally, the Employer maintains that it did not tolerate a culture that condones widespread gun horseplay without sanction.

#### **Union:**

The Union counters that the Employer has failed to meet its burden of establishing just cause for termination. Alternatively, the Union contends that discharge is too severe a sanction for several reasons. First, the Union argues that the Employer's investigation was not conducted in a fair and objective manner. Second, the Union maintains that the Employer failed to apply its rules and penalties without discrimination. Third, the Union asserts that the Employer failed to put Lindholm on notice that gun



horseplay could result in serious discipline. According to the Union, numerous Sheriff's Office supervisors were aware that Lindholm and others engaged in gun horseplay, yet they failed either to take corrective action or to warn that such continued activity would be met with discipline.

## **DISCUSSION AND OPINION**

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its termination decision. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established by a preponderance of the evidence, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See ELKOURI & ELKOURI, HOW ARBITRATION WORKS* 948 (6<sup>th</sup> ed. 2003). Both of these issues are discussed below.

### **A. The Alleged Misconduct**

The Employer introduced a voluminous amount of evidence at the hearing describing the gun horseplay activities of Deputy Lindholm. This evidence included an investigative report prepared by Sergeant Osterman that summarized approximately 50 interviews. The Employer called twelve witnesses at the hearing who testified in support of the report's conclusions. The testimony and documentary evidence together clearly corroborated the report's conclusion that Lindholm engaged in the following conduct:

Lindholm pointed his duty firearm at Deputy Andy Ellickson and tracked him with the firearm as Ellickson was driving out of the squad garage.

Lindholm pointed both his duty firearm and a small handgun at Deputy Miguel Tellez.

Lindholm pointed his duty firearm point blank and with direct physical contact to the back of Deputy Greg Reiter's head on a number of occasions.

Lindholm placed a cap gun to the back of Deputy Reiter's head and pulled the trigger on two occasions.

Lindholm pulled his duty firearm from his holster and pressed it against Deputy Reiter's chest.

Lindholm, while in a monitoring room observing the interview of a civilian, pointed a firearm at the civilian while another deputy, Danelle Erickson, was in or near the line of fire.

Lindholm repeatedly engaged in quick draws and in spinning his firearm in an "old west" manner while on duty.

Lindholm spun his duty firearm in an "old west" manner in the presence of a confidential informant

This determination is further bolstered by the fact that Lindholm did not affirmatively deny the veracity of any of the Employer's allegations.

The Employer also has established that these actions constitute serious misconduct. The repeated instances of gun horseplay violate several County and departmental policies, most notably the Sheriff's Office Firearms Policy which states: "The handgun shall never be displayed or removed from its holster other in the performance of duty, in the course of routine maintenance, or during training." It is undisputed that the Employer put Lindholm on notice of these policies and provided training consistent with the principles set out in these policies.

Further, while there is some testimony suggesting that this conduct should be excused as constituting simple pranks, these actions are more serious than mere pranks for two principal reasons: 1) gun horseplay of this type and magnitude poses a

significant safety risk due to the possibility of an accidental discharge; and 2) the treatment of a firearm as a toy tarnishes the reputation of the Sheriff's Office and denigrates the public safety mission with which it is charged.

Based on the above, the Employer has submitted sufficient proof that the employee engaged in the misconduct alleged.

## **B. The Appropriate Remedy**

The Employer further claims that discharge is an appropriate sanction under the circumstances. The Employer argues that gun horseplay constitutes serious misconduct for a peace officer and that Lindholm engaged in repeated acts of such misconduct over a period of years. The Employer also points out that supervisor and co-worker requests asking Lindholm to "knock off" the horseplay behavior were sloughed off by the grievant without any change in behavior.

The Union raises three defenses to this line of argument, arguing that discharge is too severe of a remedy in this instance. Each of these defenses is discussed below.

### **1. The Investigation**

Sergeant Osterman prepared two reports of his investigation concerning the allegations against Deputy Lindholm. In a document entitled "Investigation Steps," Sergeant Osterman outlined the investigation process and summarized the substance of the approximate 50 interviews that he conducted. Osterman then prepared a second document entitled "Investigative Summary Report" which specifically summarized the charges against Deputy Lindholm. While Osterman listened to the interview tapes in preparing the first report, he relied only on the first report in preparing the latter document in which he concluded that the investigation sustained the charges against

Lindholm. Osterman submitted the second report to Sheriff Frank in November 2004, and Sheriff Frank relied on that report in making his decision to discharge Lindholm.

The Union contends that the second report prepared by Sergeant Osterman was flawed and unfair. In its post-hearing brief, the Union summarizes its argument in this regard as follows:

The Investigative Report provided to Sheriff Frank is a sanitized document which obviously omits incriminating evidence against other deputies, disregards supervisory knowledge, targeting only Mike Lindholm. It reframes facts in a light less favorable to the truth, to the disadvantage of Mike Lindholm.

The principal objection lodged against the second report is that it focused only on the misdeeds of Lindholm and omitted most references to claims recounted in the first report of similar instances of misconduct allegedly committed by other department employees. By doing so, the Union asserts, the second report downplayed the ongoing culture of gun horseplay prevalent in the Sheriff's Office and unfairly depicted Lindholm as a lone bad actor.

During the hearing, Sergeant Osterman explained that he only included incidents in the second report that were verified by more than one interviewee. As a result, a number of unsubstantiated claims of gun play concerning other employees fell by the wayside due to the lack of substantiating information. Osterman also testified that information concerning Deputy Reiter's inappropriate use of firearms was included in a separate report submitted to Sheriff Frank.

Although the Union is correct in pointing out that the second report is relatively more critical of Lindholm than is the first report, I believe that the second report nonetheless contains a substantially accurate depiction of the evidence against Lindholm. It is also clear that the Employer had ample grounds to conclude that Lindholm had

engaged in inappropriate gun horseplay based upon a review of either document. Further, even though much of the evidence concerning Deputy Reiter's gun horseplay antics did not appear in the second report, a separate report submitted by Sergeant Osterman concerning Deputy Reiter contained this information, and Sheriff Frank had this information when considering the appropriate penalty for Deputy Lindholm.

The only relevant omission in the second report, accordingly, concerns the gun play activities of other departmental employees. This arguable defect merges with the Union's third asserted defense and is discussed below.

## **2. Disparate Treatment**

The Union claims that Lindholm's sanction was disproportionately harsh when compared to that of other employees with similar offenses. In this regard, the Union particularly makes a comparison with two other disciplinary events.

The Union first compares Lindholm's sanction with the 20-day suspension given to Deputy Reiter for his gun horseplay activities. The Union contends that Reiter engaged in a pattern of behavior very similar to that of Lindholm, yet received a substantially lesser penalty. The Union also points out that these relative sanctions do not appear to take into account the fact that Lindholm candidly admitted his gun play activities, while Reiter omitted any reference to his involvement during his initial interview with Sergeant Osterman.

The Union also makes a comparison with the discipline resulting from an incident that occurred after Deputy Lindholm's termination. In that instance, the Employer orally reprimanded Sergeant Cusick and Deputy Anderson for engaging "in horseplay with another employee using a toy weapon." The Union questions why this incident should

warrant only an oral reprimand, while Deputy Lindholm's horseplay conduct resulted in discharge.

I believe that the Employer has adequately dispelled these two comparisons by showing that Deputy Lindholm's misconduct was more severe than that of the two comparator instances. As a result of Sergeant Osterman's investigation, the Employer concluded that Reiter engaged in "quick draw" maneuvers and, on two occasions, pointed a gun at Lindholm. These activities, while warranting discipline, pale by comparison to the number of incidents engaged in by Lindholm. Similarly, a single instance of horseplay involving what all parties knew to be a toy weapon cannot compare to repeated instances of pointing a real firearm or horseplay involving a weapon that was not known by the target to be a toy. In short, the Union's claim of disparate treatment cannot stand.

### **3. The Lack of Progressive Discipline**

The Union's final line of defense is to assert that the Employer failed to provide formal warnings or to engage in progressive discipline even though department supervisors were aware of the gun play engaged in by Lindholm and others. Under these circumstances, the Union argues, it is unfair to terminate Lindholm without providing him with an opportunity to correct his behavior. The Employer, in turn, argues that Lindholm continued to engage in inappropriate gun horseplay in spite of repeated requests by fellow deputies and supervisors asking Lindholm to "knock it off." According to the Employer's post-hearing brief, this demonstrates that "the grievant is not remediable as a sworn law enforcement officer."

The evidence produced at the hearing is mixed in terms of whether a culture of inappropriate gun play existed in the Sheriff's Office. While some witnesses described

the department in “wild west” terms, a greater number of witnesses testified that inappropriate gun horseplay was not widespread. Deputy Lindholm, in his testimony, suggested that the veracity of the latter witnesses should be discounted because they were trying to avoid being caught in the same net in which he had been snared.

I do not think that it is necessary to determine whether a “wild west” culture actually existed in the Washington County Sheriff’s Office. Instead, it is sufficient to determine whether the Employer’s supervisors were aware of Deputy Lindholm’s conduct yet took no serious steps to address it. On this score, I think the record is clear. Deputies Lindholm, Reiter, and Erickson each testified that the horseplay was sufficiently widespread that the sergeants undoubtedly knew about it. Three sergeants-Richard Peterson, Pat Olson, and Brent Olson-indicated in their statements to Sergeant Osterman that they had observed Lindholm engage in gun play while on duty. These sergeants could hardly be credited with telling Lindholm to “knock it off,” as the Employer argues, and still deny that they were aware of the conduct at issue.

In spite of this knowledge, department supervisors took no formal steps to deter that conduct. No formal warnings were issued. No discipline was imposed. Instead, supervisors made only occasional remarks suggesting that Lindholm and Reiter “knock it off.” Such informal remarks do not serve as a sufficient substitute for a clear warning that an employee must alter his or her behavior or suffer the ultimate penalty of discharge.

The parties’ contract, by serially listing the various degrees of available discipline, contemplates that a course of progressive discipline usually will precede a discharge decision. The purpose of progressive discipline is to correct behavior.

NORMAN BRAND, DISCIPLINE AND DISCHARGE IN ARBITRATION 57-58 (1998). It is true, of course, that progressive discipline is not necessary when the severity of misconduct or other circumstances demonstrate that lesser forms of discipline would be futile in terms of working a correction in behavior. But, no such showing has been made in this instance. Unlike acts of theft or violence, horseplay without an intent to cause harm is not usually thought to be so severe as to obviate the possibility of a change of behavior and warrant immediate discharge. BRAND, DISCIPLINE AND DISCHARGE IN ARBITRATION, 286-88. Here, Deputy Lindholm's cooperation with the investigation, his cessation of horseplay during the investigation period, and his demeanor at the hearing indicates that "he gets it," and no longer is likely to engage in the type of activities at issue in this proceeding. As he stated repeatedly during the investigation and at the hearing, "it won't happen again." His unblemished work record for the past decade also suggests that an immediate discharge is not warranted.

In a nutshell, this case comes down to this: Deputy Lindholm engaged in an excessive amount of gun horseplay pranks. Department supervisors were aware of the situation, but took no corrective action. This failure of supervision effectively condoned the grievant's conduct and did not facilitate a correction in behavior. Yet, Lindholm, by virtue of training and experience, should have known that such conduct was inappropriate. Under these circumstances, a significant penalty short of discharge is appropriate.

This bottom line should not be read as excusing gun horseplay by peace officers. Such behavior is inappropriate and warrants a significant disciplinary response. Indeed, any future instances of gun horseplay by Deputy Lindholm likely would place his job in



grave jeopardy. But, the Employer should not deprive Deputy Lindholm of his career for non-malicious behavior without at least providing him with fair warning to cease such activities.

### **AWARD**

The Grievance is sustained in part and denied in part. The Employer had just cause to discipline the grievant, but the sanction is reduced to a suspension of thirty (30) days without pay. The Employer is directed to reinstate Deputy Lindholm and to make him whole for any resulting loss in pay and benefits less any compensation earned in mitigation. The Employer also is directed to correct Deputy Lindholm's personnel file to reflect this determination. Jurisdiction is retained for a period of sixty (60) days from the date of this award.

Dated: April 25, 2006

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Stephen F. Befort  
Arbitrator